IN THE HIGH COURT OF BOMBAY AT GOA, PANAJI-GOA.

WRIT PETITION NO. 483 OF 2005

MRS. MARIANINHA FERNANDES VAZ
R/O. E-239, MACHADO VADDO,
CARANZALEM ILHAS GOA. .... PETITIONER

Versus

1. MR. PETER FERNANDES
R/O. MACHADO VADDO,
CARANZALEM, ILHAS GOA.

2. MRS. IRENE CAIADO FERNANDES
R/O. MACADO VADDO,
CARANZALEM, ILHAS GOA. .... RESPONDENTS

Shri E. Dias, Advocate for the Petitioner.
Shri Parag S. Rao, Advocate for Respondents.

CORAM: **SMT. RANJANA DESAI, J**.

DATE : **12h July, 2006**

ORAL ORDER :

In this Writ Petition, the petitioner has challenged order dated 26/02/1999 passed in Special Civil Suit No.129/89/A whereby the petitioner's application for bringing on record heirs of deceased plaintiff 2 was dismissed and also order dated 4/11/1999 passed by the Additional District Judge, Panaji dismissing the appeal filed by the petitioner challenging the said order.

2. It appears that plaintiff 2 died on 25/01/1998. The application for bringing heirs on record was moved on 9/09/1998. It was not accompanied by application for condonation of delay. The application for condonation of delay and setting aside abatement was moved only on 26/11/1998. The Courts below took a view that by virtue of the provisions of Order 22 Rule 3 of CPC the petitioner having failed to bring heirs on record within time, the suit stood automatically abated. It was observed that in the application for condonation of delay and setting aside abatement no sufficient cause was assigned by the appellant.

3. I have heard the learned Counsel for the petitioner and the learned Counsel for the respondent. Learned Counsel for the petitioner contended that the petitioner has stated in the application that after the death of her husband she was in a depressed mood and therefore she could not file the application in time. He submitted that therefore, it cannot be said that there was no sufficient cause for filing the application in time. The learned Counsel further contended that in any event the suit had not abated because the widow of the deceased was on record and she was representing the heirs of the deceased. In this connection the learned Counsel relied on ***Newanness alias Mewajannessa*** **Versus** ***Shaikh***

Mohamad & Ors. (AIR 1996 SC 702) and ***Raghunath Shablo Audi & Anr.*** **Versus** ***Eugenio Afonso & Ors.*** (1998 (2) Goa L.T. 24).

4. Learned Counsel for the respondent on the other hand submitted that on death of a person a widow is entitled to 50% of share of the property of the deceased and the children are entitled to the remaining 50% of the property. He submitted that, therefore, the widow could not have represented the interest of the other heirs.

5. I am unable to accept the submission of the learned Counsel for the respondents. In the matter of abatement, the Court cannot take hyper technical approach. In any case, since the widow was already on record, in the light of the judgment of the Supreme Court in ***Newanness's*** case (supra) the question of abatement does not arise. Similar view has been taken by this Court in the case of ***Raghunath Shablo Audi & Anr.***(supra). Besides the explanation for delay given by the appellant appears to me to be proper. Hence the following order:

6. Impugned orders are quashed and set aside. The application dated 9/09/1998 filed by the petitioner to bring heirs on record and

application date 26/11/1998 for condonation of delay caused in bringing heirs on record is allowed on the condition that the petitioner pays costs of Rs.5,000/- to the respondents within a period of one month from today. Payment of costs is condition precedent to setting aside the abatement and condonation of delay. On abatement being set aside the suit shall proceed. The parties shall appear before the trial court on 8/08/2006.

SMT. RANJANA DESAI, J.

NH/-